**HARTA TUAS SDN BHD**

**v.**

**UB USAHABINA SDN BHD**

HIGH COURT MALAYA, MELAKA
LOW HOP BING J
[CIVIL SUIT NO: MT1-22-169-2003]
30 JUNE 2005

***CIVIL PROCEDURE:*** *Affidavits - Admissibility - Corrective affidavit - Filed for purpose of exhibiting correct contract in place of wrong contract - Whether distinguished from admission of fresh or new evidence - Whether outside ambit and purview of O. 56 r. 1(3A) Rules of the High Court 1980 - Whether bona fide error should be rectified by way of corrective affidavit*

The plaintiff herein had applied for summary judgment under O. 14 of the Rules of the High Court 1980 against the defendant and had *vide* affidavit affirmed by one Chew Kok Wing exhibited a contract in exh. CKW1. The learned registrar entered summary judgment against the defendant. Against the said decision, the defendant filed an appeal to the judge in chambers. At the hearing of the appeal, the defendant raised the issue of the difference in the contract sum pleaded in the plaintiff's statement of claim and that stated in the contract in exh. CKW1. Hence, the plaintiff filed this application by way of summons in chambers for an order that at the hearing of the appeal to the judge in chambers, the plaintiff be allowed to use the corrective affidavit so that the correct contract could be brought to the attention of the court. The issues that arose for determination were (1) whether plaintiff's application was for admission of fresh evidence under O. 56 r. 1(3A) of the Rules of the High Court 1980 and (2) whether in this appeal by way of rehearing, in the exercise of discretion, the court should admit or exclude the corrective affidavit.

**Held (order in terms of plaintiff's application):**

**[1]** A corrective affidavit filed for the purpose of exhibiting a correct contract in place of a wrong contract in the original affidavit which remained the same must be distinguished from the admission of fresh or new evidence. Thus, the plaintiff's application for the inclusion of a correct affidavit to put in place the correct contract was outside the ambit and purview of the provisions of O. 56 r. 1(3A) Rules of the High Court 1980. (p 469 c)

**[2]** As the wrong contract had been exhibited as a result of an oversight arising out of a *bona fide* human error, that error should be allowed to be rectified by way of a corrective affidavit. Hence, the defendant's objection was devoid of merits and hereby overruled. (pp 469 g & 470 d)

*[Defendant be given liberty to file an affidavit in reply to plaintiff's corrective affidavit. Costs in the cause.]*

**Case(s) referred to:**

*Amanah Factors Sdn Bhd v. Trans Resources Corp Sdn Bhd & Ors [1992] 1 LNS 78* ***(refd)***

*Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd [2004] 4 CLJ 825 HC* ***(refd)***

*John Trawe Kuda v. Adtec Sdn Bhd [1996] 4 CLJ 42 HC* ***(refd)***

*Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd [2003] 1 CLJ 12 CA* ***(refd)***

*Punca Klasik Sdn Bhd v. Seok Kim Leow [1996] 4 CLJ 399 HC* ***(refd)***

*Re Lim Hong Kee David [1995] 4 CLJ 627 HC* ***(refd)***

*Sogelease Advance (M) Sdn Bhd v. Sri Datai Engineering Sdn Bhd & Ors [2002] 6 MLJ 59* ***(refd)***

*Standard Chartered Bank v. Kentland Sdn Bhd & Anor [1989] 1 CLJ 1126; [1989] 2 CLJ (Rep) 510* ***(refd)***

*Tetuan Tanjung Teras Sdn Bhd & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd [2003] 7 CLJ 124 HC* ***(refd)***

*United Malayan Banking Corporation Bhd v. Datin Theresah Abdullah & Anor [1994] 4 CLJ 1074 HC* ***(refd)***

**Legislation referred to:**

Rules of the High Court 1980, O. 14, O. 41 r. 1(4), O. 56 r. 1(3A), O. 92 r. 4

*For the plaintiff - CG Tan; M/s Soh Yok Lam & Co*
*For the defendant - Ravinathan Muthiah; M/s Ravi Muthiah & Co*

*Reported by Suhainah Wahiduddin*

## JUDGMENT

**Low Hop Bing J:**

**Application**

This is an application by way of summons in chambers in enclosure (32) filed by the plaintiff for an order that at the hearing of the appeal to judge in chambers in enclosure (15), the plaintiff be allowed to use the corrective affidavit affirmed by one Chew Kok Wing ("Chew") on 28 February 2005.

a **Factual Background**

In support of the plaintiff's application in encl. (13) for summary judgment for RM508,604.21 under O. 14 of the Rules of the High Court 1980 against the defendant, the plaintiff had on 5 April 2004 *vide* affidavit affirmed by Chew for the plaintiff exhibited a contract in "CKW1".

b A reference hereinafter to an order and rule is a reference to that order and rule in the Rules of the High Court 1980 unless the context otherwise requires.

On 28 May 2004, the learned registrar has entered summary judgment against the defendant. Against that decision, the defendant has filed an appeal to the c judge in chambers.

At the hearing of the appeal to judge in chambers, the defendant had for the first time on 14 February 2005 raised the issue of the difference in the contract sum pleaded in the plaintiff's statement of claim and that stated in the contract in exh. CKW1.

d The plaintiff has now realised that a *bona fide* mistake and an oversight had led the plaintiff to exhibit the wrong contract, as the correct contract should have been exhibited, which is now exhibited in the corrective affidavit.

**Order 41 r. 1(4)**

e Although para 3 of the defendant's affidavit in encl. (33) affirmed by one Dato' Abdul Aziz bin Mat Daud has raised a preliminary objection on the ground that Chew's affidavit in encl. (31) is defective by reason of its non-compliance with O. 41 r. 1(4), I am unable to find this objection in the submission by defendant's learned counsel Mr. Ravinathan Muthiah.

f Mr. CG Tan, learned counsel for the plaintiff, submitted that O. 41 r. 1(4) has been complied with.

In the light of the absence of submission by defendant's learned counsel in this regard, I am of the view that the defendant has ceased to attach any weight g or credence to the objection.

However, for purposes of completeness, O. 41 r. 1(4) merits reproduction as follows:

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**1. Form of affidavit (O. 41 r. 1)**

(1) …

(2) …

(3) …

(4) Every affidavit must be expressed in the first person and must state the place of residence of the deponent and his occupation or, if he has none, his description, and if he is, or is employed by, a party to the cause or matter in which the affidavit is sworn, the affidavit must state the fact.

My perusal of Chew's affidavit immediately reveals that it has been expressed in the first person, stated his place of residence, and his occupation as a director of the plaintiff and so has complied with O. 41 r. 1(4). I am therefore unable to see the defendant's rationale in the defendant's affidavit wherein this objection was raised, as it is clearly and plainly an exercise in futility.

**Appeal By Way Of Rehearing And Discretion**

It was argued for the plaintiff that in this appeal by way of rehearing, the inclusion of the correct contract was in line with the plaintiff's statement of claim and that it was not an admission of fresh evidence and should be allowed, on the authority of *John Trawe Kuda v. Adtec Sdn Bhd* [1996] 4 CLJ 42 HC; *United Malayan Banking Corporation Berhad v. Datin Theresah bte Abdullah & Anor.* [1994] 4 CLJ 1074 HC; *Standard Chartered Bank v. Kentland Sdn. Bhd. & Anor.* [1989] 1 CLJ 1126; [1989] 2 CLJ (Rep) 510 HC; and *Amanah Factors Sdn Bhd v. Trans Resources Corp Sdn Bhd & Ors* [1992] 1 LNS 78.

1. the inclusion of the corrective affidavit would be prejudicial to the defendant as it involves admission of fresh evidence under O. 56 r. 1(3A) under which conditions must be fulfilled, on the basis of *Punca Klasik Sdn Bhd v. Seok Kim Leow* [1996] 4 CLJ 399 HC; *Tetuan Tanjung Teras Sdn Bhd & Ors v. Tetuan Syn Tai Hung Trading Sdn Bhd* [2003] 7 CLJ 124 HC; *Milik Perusahaan Sdn Bhd & Anor v. Kembang Masyur Sdn Bhd* [2003] 1 CLJ 12 CA; *Re Lim Hong Kee David* [1995] 4 CLJ 627 HC; *Sogelease Advance (M) Sdn Bhd v. Sri Datai Engineering Sdn Bhd & Ors* [2002] 6 MLJ 59; and

2. this court should not exercise its inherent jurisdiction under O. 92 r. 4, as specific provisions are contained in O. 56 r. 1(3A).

Under this head, there are two issues for determination.

The first is whether the plaintiff's application is for the admission of fresh evidence under O. 56 r. 1(3A) which reads as follows:

> **1. Appeals from certain decisions of Registrar to Judge in Chambers (O. 56 r. 1)**
>
> (1) …
>
> (2) …
>
> (3) …
>
> (3A) At the hearing of the appeal fresh evidence shall not be admitted unless the Judge is satisfied that:
>
> (a) at the hearing before the Registrar the new evidence was not available to the party seeking to use it, or that reasonable diligence would not have made it so available; and
>
> (b) the fresh evidence, if true, would have had or would have been likely to have had a determining influence upon the decision of the Registrar.

In my judgment, an analysis of the authorities cited for the defendant in relation to O. 56 r. 1(3A) would throw some light as to the ambit and purview of the provisions.

*Punca Klasik, supra,* concerns an appeal to judge in chambers dated 3 November 1995, which was fixed for hearing for 27 December 1995, but was postponed to 19 January 1996 due to a change of solicitors. On 19 January 1996, the new solicitors obtained a new hearing date ie, 7 February 1996 when another date was given as defendant's counsel wanted to file a fresh affidavit.

On 13 February 1996, the court heard submissions in relation to the defendant's application for time to file, *inter alia*, fresh affidavit for fresh evidence to be admitted. In dismissing the application, Abdul Malik Ishak J held that there was no averment in the counsel's affidavit to say that the new evidence was not available to the defendant in the hearing before the registrar nor was there any averment that reasonable diligence would have not made it available.

The other authorities *viz Tetuan Tanjung Teras, supra;* and *Re Lim Hong Kee David, supra,* also concern applications for fresh or new affidavits.

In *Sogelease, supra*, there was no application for the admission of either a corrective affidavit or a fresh affidavit.

In my judgment, there can be no doubt that the instant application is for the admission of a corrective affidavit so that the correct contract can be brought to the attention of the court as the contract exhibited before the learned registrar was clearly the wrong contract. However, before the learned registrar, the defendant had never challenged the contract as the wrong contract but has remained silent, until 14 February 2005 when submissions were presented for the defendant. It is plain to me that there was an oversight arising out of a bona fide human error when the wrong contract was exhibited by the plaintiff in the first instance.

A corrective affidavit to be filed for the purpose of exhibiting the correct contract in place of the wrong contract in the original affidavit which remained the same must be distinguished from the admission of fresh or new evidence which is never the subject matter of the plaintiff's application herein.

In the circumstances, I hold that the plaintiff's application for the inclusion of a corrective affidavit to put in place the correct contract is outside the ambit and purview of the provisions of O. 56 r. 1(3A).

The second and final issue is whether I should, in this appeal by way of rehearing, in the exercise of discretion, admit or exclude this corrective affidavit.

In the exercise of my discretion, it is necessary for me to look at all the facts and circumstances of this application and all the established judicial principles which may be gathered from the relevant judgments of our courts.

In *John Trawe Kuda, supra,* Richard Malanjum J (now FCJ) after referring to a plethora of authorities held, *inter alia*, that an appeal from registrar to a judge in chambers is dealt with by way of rehearing and that parties are at liberty to file further affidavits for consideration and the judge is bound to consider all affidavits filed before the hearing of the appeal. See also *United Malayan Banking Corporation, supra,* p. 1083a; *Standard Chartered Bank, supra, Amanah Factors, supra.*

As the wrong contract has been exhibited as a result of an oversight arising out of a *bona fide* human error, that error should be allowed to be rectified by way of a corrective affidavit. In this regard, it is instructive to refer to the following passage:

> It is a well established principle that the object of the Court is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights … I know of no kind of error or mistake which, if not fraudulent or intended to overreach, the Court ought not to correct, if it can be done without injustice to the other party. (per Bowen LJ in *Cropper v. Smith* [1883] 26 Ch. D 700, p. 710-711, with which observations AL Smith LJ, expressed 'emphatic agreement' in *Shoe Machinery Co. v. Cultam* [1896] 1 Ch 108, p. 112).

The above passage was referred to by Abdul Malik Ishak J in *Bumiputra-Commerce Bank Bhd & Ors v. Bumi Warna Indah Sdn Bhd* [2004] 4 CLJ 825 at p. 828e when the learned judge allowed the defendant to amend the defence which was defectively drafted due to the mistake or otherwise of the solicitors. Although the principle was enunciated in relation to an application for leave to amend pleadings, in so far as the issue of mistake is concerned, I have adopted it *mutatis mutandis*.

**Conclusion**

On the foregoing grounds, I hold that the defendant's objection is devoid of merits and is hereby overruled. I therefore make an order in terms of this application with a consequential order that the defendant be given liberty to file an affidavit in reply to the plaintiff's corrective affidavit. Costs in the cause.